

JAN 17 1972

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# In the Supreme Court of the United States

TERM 1971

No. 70-314

BRUNETTE MACHINE WORKS LTD.,

*Petitioner,*

vs.

KOCKUM INDUSTRIES, INC.,

*Respondent.*

*On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit*

## BRIEF FOR PETITIONER

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**BRIEF FOR PETITIONER**

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**OPINION BELOW**

The opinion of the Court of Appeals is reported at 442 F.2d 420, 169 U.S.P.Q. 772, and appears in the Single Appendix hereto (App. 19).

**JURISDICTION**

The judgment of the Court of Appeals was entered on April 20, 1971 (App. 1). No petition for re-

hearing was filed. A petition for certiorari was filed June 21, 1971, and granted December 7, 1971. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).<sup>1</sup>

### STATUTES INVOLVED

"28 U.S.C. § 1391. Venue generally

\* \* \* \* \*

"(d) An alien may be sued in any district."<sup>2</sup>

"28 U.S.C. § 1400. Patents and copyrights

\* \* \* \* \*

(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."<sup>3</sup>

### QUESTION PRESENTED

Whether in a patent infringement suit, where defendant is an alien, venue is controlled by 28 U.S.C. § 1400(b), the specific patent venue statute, or by 28 U.S.C. § 1391(d), the general venue statute regarding aliens.

<sup>1</sup> Act of June 25, 1948, c. 646, 62 Stat. 928.

<sup>2</sup> Act of June 25, 1948, c. 646, 62 Stat. 935.

<sup>3</sup> Act of June 25, 1948, c. 646, 62 Stat. 936.



## STATEMENT OF THE CASE

Respondent, Kockum, on January 23, 1969 filed a complaint in the District Court for the District of Oregon charging petitioner, Brunette, an alien corporation of British Columbia, Canada, with infringement of United States Letters Patent Nos. 2,775,274 and 2,855,010 (App. 2). On February 7, 1969, pursuant to Rule 12(b) Federal Rules of Civil Procedure, Brunette moved for dismissal of the suit on the ground of improper venue (App. 17). It is undisputed that Brunette is not a resident of Oregon and that it has no regular and established place of business in Oregon. On February 20, 1969, the District Court entered an order granting the motion for dismissal on the ground that venue was improper (App. 18). There was no opinion by the District Court. Kockum appealed, and on April 20, 1971 the Court of Appeals for the Ninth Circuit entered its judgment reversing the District Court. A petition for writ of certiorari was filed on June 21, 1971 and granted on December 7, 1971 (App. 1).

## SUMMARY OF ARGUMENT

In 1897 when Congress enacted the first specific venue statute for patent infringement suits, it did not except aliens, although Congress was well aware of the prior-established law that permitted defendants in such suits, either alien or domestic, to be sued in any district in which they could be served. The decisions



of this Court, since 1897, have consistently rejected all attempts to broaden the general venue statute to include defendants in patent infringement suits. The Court has correctly rejected such attempts because the Congressional intent has clearly been that in patent infringement suits, § 1400(b) is the sole and exclusive statute controlling venue.

An owner of a United States patent is well protected against a foreign-made import that infringes his patent. Anyone who uses or sells the infringement in this country is subject to a patent infringement suit. Even if an alien importer is not subject to suit in any District Court, certain sections of the Tariff Act protect the United States patent owner from entry into this country of the import. Under that Act, a patent owner can obtain safer and more effective protection than by a suit for infringement in a District Court.

### ARGUMENT

Legislative and judicial history indicate that 28 U.S.C. § 1400(b), alone, controls venue in patent infringement suits.

Until the Patent Act of 1897<sup>4</sup> there was no specific venue statute for patent infringement suits. Prior to that time, such suits could be brought in any district in which the defendant, alien or domestic, could be served.<sup>5</sup>

<sup>4</sup> Act of March 3, 1897, c. 395, 29 Stat. 695.

<sup>5</sup> *Re Hohorst*, 150 U.S. 653 (1893); *Re Keasbey & Mattison Company*, 160 U.S. 221 (1895).

That Act, which might well be thought of as the Congressional response to *Hohorst* and *Keasbey*, furnished the first specific patent venue statute—providing, without exceptions, that a patent infringement suit could be brought only in the district in which the defendant was an inhabitant, or in which he had committed acts of infringement and had a regular and established place of business. Had Congress intended to except alien defendants from this statute, it would surely have included a simple statement to that effect. The absence of such a statement, in light of Congressional awareness of *Hohorst* and *Keasbey* (which cases specifically discussed the venue situation with respect to an alien defendant in a patent suit), is good indication of an intent *not* to create such an exception.

In 1942, this Court held that the Act of 1897 was a restrictive special venue statute which applied to patent suits to the exclusion of the general venue statute.<sup>6</sup> The opinion in *Stonite* carefully reviewed the history of venue in patent suits, noting that *Hohorst* and *Keasbey* stood for the proposition that alien defendants in patent suits could be sued wherever they could be found. Immediately following that notation, the Court said, 315 U.S. at 565-66:

“The Act of 1897 was adopted to define the exact jurisdiction of the Federal courts in actions to enforce patent rights and thus eliminate the uncertainty produced by the conflicting decisions on the applicability of the Act of 1887 as amended to such litigation. *That purpose indicates that Con-*

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<sup>6</sup> *Stonite Products Co. v. Lloyd Co.*, 315 U.S. 561 (1942).

gress did not intend the Act of 1897 to dovetail with the general provisions relating to the venue of civil suits, but rather that it alone should control venue in patent infringement proceedings." (Emphasis added).

In 1948, the patent venue provision in the Act of 1897 (which had previously been codified as Section 48 of the Judicial Code<sup>7</sup>) was revised and recodified as 28 U.S.C. § 1400(b).

In 1957, *Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222, was decided in view of certain lower court decisions which held that 28 U.S.C. § 1391 (c) should be read into § 1400(b) to allow a corporation to be sued for patent infringement in any district in which it is doing business.<sup>8</sup> The Court there said that *Stonite* still controlled, unless a substantive change had been made in the law by the 1948 revision and recodification. After reviewing the 1948 legislation with respect to patent suits, the Court concluded that there had been no substantive change, and that therefore, in patent infringement suits the *Stonite* rule still controlled, with § 1400(b) governing to the exclusion of § 1391(c).

In 1961 came *Schnell v. Eckrich & Sons*, 365 U.S. 260. That case involved an Illinois corporation which had assumed control of the defense of a patent infringement suit against an Indiana customer. The

<sup>7</sup> Act of March 3, 1911, c. 231, 36 Stat. 1100, 28 U.S.C. § 109 (1940).

<sup>8</sup> *Dalton v. Shakespeare Co.*, 196 F.2d 469 (5 Cir. 1952); *Fourco Glass Co. v. Transmirra Prod. Corp.*, 283 F.2d 885 (2 Cir. 1956).

Illinois corporation had no place of business in Indiana, but plaintiff claimed that by controlling the defense it had waived venue. The Court held that control of the defense, even though defendant would be bound by *res judicata*, did not constitute waiver of venue. The Court said, 365 U.S. at 262-63:

"As late as 1957 we have held § 1400 (b) to be 'the sole and exclusive provision controlling venue in patent infringement actions.' *Fourco Glass Co. v. Transmirra Products Corp.* 353 US 222, 229, 1-L ed 2d 786, 790, 77 S Ct 787 (1957). The language of this special statute is clear and specific. The practice complained of here was not at all unusual at the time of this statute's passage, and for us to enlarge upon the mandate of the Congress as to venue in such patent actions would be an intrusion into the legislative field."

The Seventh Circuit in *Coulter Electronics, Inc. v. A. B. Lars Ljungberg & Co.*, 376 F.2d 743 (1967), cert. den. 389 U.S. 859, held that § 1391(d) did not supplement § 1400(b). That case involved a fact situation similar to the present one. A Swedish corporation was sued for patent infringement in Chicago. The corporation had no regular and established place of business in the United States, and its machines were sold through an independent agency in the Northern District of Illinois. The Seventh Circuit said that plaintiff was, in effect, asking it for "judicial legislation" despite its protests to the contrary. The court then went on to review this Court's decisions in *Hohorst*, *Stonite*, *Fourco*, and *Schnell*, and came to the firm conclusion that the construction given to

§ 1400(b) by this Court precluded any exceptions to the rule that it was the sole and exclusive statute controlling venue in patent infringement suits.

Kockum now argues, relying principally on *Chas. Pfizer & Co. v. Laboratori Pro-Ter Prodotti Terapeutici*, 278 F. Supp. 148, 154 (S.D. N.Y. 1967) and similar cases,<sup>9</sup> that neither the Seventh Circuit in *Coulter* nor this Court in *Fourco* "considered the legislative history of § 1391(d) as reflected in the Revisers' Notes which distinguishes it from § 1391(c) and shows that § 1391(d) unlike § 1391(c) was intended to supplement § 1400(b)." The Revisers' Notes with respect to § 1391(d) are as follows, 28 U.S.C.A., p. 62:

"Subsection (d) of this section is added to give statutory recognition to the weight of authority concerning a rule of venue as to which there has been a sharp conflict of decisions. See (*Sandusky Foundry & Machine Co. v. De Lavand*, 1918, D.C. Ohio, 251 F. 631, 632, and cases cited. See also *Keating v. Pennsylvania Co.*, 1917, D.C. Ohio, 245 F. 155 and cases cited.)"

Review of the *Sandusky* and *Keating* cases (men-

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<sup>9</sup> *Societe Industries Mechaniques Allies v. Honorable Oren R. Lewis et al*, unreported, cert. den. June 7, 1971 (4 Cir. 1971); *Olin Mathieson Chemical Corp. v. Molins Organizations, Ltd.*, 261 F. Supp. 436 (E.D. Va. 1966); *Japan Gas Lighter Association v. Ronson Corp.*, 257 F. Supp. 219 (D. N.J. 1966); *Deering Milliken Research Corp. v. Stahlecker*, 166 U.S.P.Q. 321 (D.S.C. 1969); *SCM Corp. v. Brother International Corp.*, 316 F. Supp. 1328 (S.D. N.Y. 1970); *Deering Milliken Research Corp. v. Vecchioni*, 168 U.S.P.Q. 59 (E.D. Va. 1970).



tioned in the preceding quotation), and of the authorities cited therein, shows that the "conflict of decisions" with which Congress was concerned centered on the *general venue issue* regarding alien defendants. The cases and authorities reveal *no other venue conflict*. It is thus clear that in adding § 1391(d), Congress intended, merely, to recognize the then weight of judicial authority regarding venue *generally* in a suit against an alien. Clearly, there was no intent to have § 1391(d) create an exception to § 1400(b). If such an intent had been present, appropriate revision would have been made directly to § 1400(b).

Language in *Fourco* regarding § 1391(c) and corporations vis-a-vis § 1400(b) is fully applicable in the present case to § 1391(d) and aliens (353 U.S. at 228):

"The main thrust of respondents' argument is that § 1391(c) [1391(d)] is clear and unambiguous and that its terms include all actions—including patent infringement actions—against corporations [aliens], and, therefore, that the statute should be read with, and as supplementing, § 1400(b) in patent infringement actions. That argument is not persuasive, as it merely points up the question and does nothing to answer it. For it will be seen that § 1400(b) is equally clear and, also, that it deals specially and specifically with the venue in patent infringement actions. Moreover, it will be remembered that old § 52 of the Judicial Code (28 USC (1940 ed) § 113) was likewise clear and generally embracing, yet the *Stonite* case held that it did not supplement the specific patent infringement venue section (then §

48 of the Judicial Code, 28 USC (1940 ed) § 109). The question is not whether § 1391(c) [1391(d)] is clear and general, but, rather, it is, pointedly, whether § 1391(c) [1391(d)] supplements § 1400(b), or, in other words, whether the latter is complete, independent and alone controlling in its sphere as was held in *Stonite*, or is, in some measure, dependent for its force upon the former." (Bracketed parts added for emphasis.)

Clearly, then, and as this Court has already determined in *Fourco*, the 1948 revision to the Judicial Code made no substantive change to § 1400(b). If Congress had intended to reverse its policy expressed in the Act of 1897, and to expand rather than limit the forums in which an alleged patent infringer could be sued, it would have made a change directly in § 1400(b). In the same section of the statute, § 1400 (a), Congress made it clear that in copyright cases a defendant could be sued in any district where "the defendant or his agent resides or may be found."<sup>10</sup> The limitations which appear as to defendants in patent infringement suits in § 1400(b) were intended to cover *all* defendants, not just some as argued by *Kockum*.

<sup>10</sup> "§ 1400. Patents and copyrights

"(a) Civil actions, suits, or proceedings arising under any Act of Congress relating to copyrights may be instituted in the district in which the defendant or his agent resides or may be found."



**A patent owner is well protected against alien importers of infringing articles, including aliens who are not subject to suit in any District Court.**

The supposed dire consequences and injustices to patent owners, predicted to result from failure to except alien importers of infringing articles from the special patent venue statute, are more imagined than real (*Pfizer*, 278 F. Supp. at 153). Assuming that an alien producer's articles are imported that infringe a United States patent, and the alien source is not subject to suit under the provisions of § 1400(b) anywhere in the United States, the patent owner has at least two ways of obtaining effective protection and relief. First, he can sue anyone in this country who "... uses or sells ..." the patented invention.<sup>11</sup> And, on obtaining a final decision supporting validity of the patent, the owner is in a position to stop all others who make, use or sell the invention in the United States.<sup>12</sup>

Secondly, a patent owner can proceed via the Tariff Commission for exclusion from entry into the United States of infringements.<sup>13</sup> The Secretary of

<sup>11</sup> 35 U.S.C. § 271, Act of July 19, 1952, c. 950, 66 Stat. 811.

"Infringement of patent

"(a). Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent."

<sup>12</sup> *Blonder-Tongue Labs v. University of Illinois Foundation*, 402 U.S. 313 (1971).

<sup>13</sup> Section 337 of the Tariff Act of 1930, c. 497, 46 Stat. 703, 19 U.S.C. § 1337.

the Treasury can forbid entry into this country through all ports of entry of anything which violates a United States patent. In this connection, it is noteworthy that it has been held that under such proceedings the validity of the patent may not be questioned by the Tariff Commission or by the appellate court, because a "patent must be considered valid unless and until a court of competent jurisdiction has held otherwise."<sup>14</sup> This means that while an alien importer may be able to avoid an infringement suit in a District Court, he will be subject to a Tariff Commission proceeding in which he will not be able to raise the most effective defense, i.e., invalidity of the patent.

Reference to the Tariff Act is most illuminating with respect to how Congress intended to protect owners of United States patents from alien importers. *In re Orion Co.*, 71 F.2d 458 (C.C.P.A. 1934) is a case dealing with § 337 of the Tariff Act of 1930 (19 U.S.C. § 1337), in which the following is stated (at 467):

"At the time H.R. 2667 was being considered, the United States Tariff Commission called the attention of the Ways and Means Committee to the difficulties had in the administration of sections 315, 316, and 317 of the Tariff Act of 1922 and made this suggestion:

"Importance of Commission's Jurisdiction of Patent Infringements.

"Existing law, apart from section 316, is wholly inadequate to protect domestic owners of

<sup>14</sup> *In re Von Clemm*, 229 F.2d 441, 444 (C.C.P.A. 1955).

patents from violation of their patent rights through the importation and sale of infringing articles. Such infringing articles may be and are imported in large quantities and distributed throughout the United States. The owner of a patent, seeking to protect himself, is confronted with the necessity of proceeding against individual wholesalers or retailers. The resulting multiplicity of suits imposes an impossible burden. Stoppage of importation of infringing articles through an order of exclusion from entry is the only effectual remedy. The jurisdiction of district courts and the scope of any decree issued by them do not extend to the importation or exclusion of imported merchandise from entry into the United States. Section 316, therefore, as construed by the Tariff Commission in its findings now before the Court of Customs Appeals for review, affords an exclusive remedy. (Vol. 17, Supp. to Tariff Readjustment Reports on Tariff Bill of 1929, page 10667.)'

"Thereafter, the committee reported to the House, in part, as follows: 'The only change made by the section over existing law is the elimination of the provision which authorized the President to impose such additional duties not in excess of 50 per cent or less than 10 per cent of the value of the article imported in violation of the section as would offset the unfair method or act employed. The committee feels that this provision should not be retained for the reason that the imposition of penalty duties to offset violations is entirely inadequate to prevent further violations. The effective remedy is to exclude from entry the articles concerned in the violation. (Report Ways

and Means Com. on H. R. 2667, Rept. No. 7, 71st Congress, 1st Session, p. 166.)'”

See also *In re Amtorg Trading Corporation*, 75 F.2d 826 (C.C.P.A. 1935) which held that § 337 of the Tariff Act of 1930 could not be extended to protecting the owner of a United States process patent from importation of an unpatented product made in a foreign country according to the patented process. In order to give owners of United States process patents the protection denied them in *Amtorg*, § 1337a was added to Title 19 in 1940 expressly covering an imported product made in violation of a United States process patent.<sup>15</sup>

From the foregoing it is clear that Congress, in enacting the Tariff Acts of 1922 and 1930, was well aware that an alien importer of infringing articles, under certain circumstances, could avoid an infringement suit in the United States. Its answer to this situation was § 316 of the Tariff Act of 1922, and § 337 of the Tariff Act of 1930. As the Tariff Commission stated in its decision which was under review in *Amtorg* (75 F.2d at 829, n. 3):

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<sup>15</sup> “§ 1337a. Same; importation of products produced under process covered by claims of unexpired patent”

“The importation for use, sale, or exchange of a product made, produced, processed, or mined under or by means of a process covered by the claims of any unexpired valid United States letters patent, shall have the same status for the purposes of section 1337 of this title as the importation of any product or article covered by the claims of any unexpired valid United States letters patent.” Act of July 2, 1940, c. 515, 54 Stat. 724.

"In enacting section 316 of the Tariff Act of 1922 [19 USCA §§ 174-180] and section 337 of the Tariff Act of 1930 the Congress did in effect . . . what . . . was not done by amendment to the patent laws. . . ."

### CONCLUSION

This Court, adhering to established rules of statutory construction,<sup>16</sup> has consistently, and correctly, refused to enlarge upon the Congressional mandate concerning venue in patent infringement suits.<sup>17</sup> It has refused to permit the general venue statute to prevail over the special patent venue statute. It has done so, quite apparently, fully recognizing that history affords no showing of the requisite Congressional intent which would permit such an enlargement.

The present suit is but another attempt to expand, extra-Congressionally, the forums in which patent infringement suits may be brought. In this attempt, Kockum should fare no better than the moving parties in *Stonite*, *Fourco*, *Schnell* and *Coulter*.

<sup>16</sup> *MacEvoy v. United States*, 322 U.S. 102, 107 (1944); *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932).

<sup>17</sup> In *Schnell v. Eckrich & Sons*, 365 U.S. at 264, the Court said: "The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction." *Olberding v. Illinois Cent. R. Co.*, supra. (346 US at 340)." (See also *Grantham v. Challenge-Cook Bros., Inc.*, 420 F.2d 1182, 1184 (7 Cir. 1969).

The judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Dated, Portland, Oregon, January 14, 1972.

Respectfully submitted,

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